

CHAPTER 248  
SB 353 – FINAL VERSION

03/06/14 0716s  
23Apr2014... 1310h  
05/08/14 1804EBA

2014 SESSION

14-2794  
05/06

SENATE BILL       **353**

AN ACT           recodifying RSA 168-B, relative to surrogacy.

SPONSORS:       Sen. Bradley, Dist 3; Sen. Stiles, Dist 24; Sen. Soucy, Dist 18; Sen. Carson,  
Dist 14; Sen. Pierce, Dist 5; Rep. J. MacKay, Merr 14; Rep. Wallner, Merr 10

COMMITTEE:      Judiciary

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ANALYSIS

This bill recodifies RSA 168-B, relative to surrogacy.

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Explanation:     Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struck through~~].  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Fourteen*

AN ACT                   recodifying RSA 168-B, relative to surrogacy.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1           248:1 Purpose. The purpose of this chapter is to update New Hampshire’s surrogacy law to  
2 reflect advances in assisted reproduction technologies and updated surrogacy laws that have been  
3 enacted across the United States, and to meet the needs of individuals who wish to become parents,  
4 but physically cannot for whatever reason. Assisted reproductive technologies allow for the  
5 possibility of parenthood that otherwise would not be available for these individuals. In addition,  
6 families, who are looking for an appealing alternative to adoption due to their desire to have a child  
7 with the same genetic makeup of one, or both, of the intended parents, are increasingly looking to  
8 assisted reproductive technologies. There have been significant advancements in assisted  
9 reproductive technologies over the past few decades, and these technologies are rapidly growing in  
10 both use and acceptance, so much so that surrogacy is almost considered commonplace. However,  
11 despite the fact that the needs of families have been increasingly met through assisted reproductive  
12 technologies, specifically gestational surrogacy, our laws have not kept pace with advancing  
13 technology. As our society changes regarding opportunities for parenthood, it is important that New  
14 Hampshire’s governing law keeps pace and remains relevant to the needs of New Hampshire’s  
15 families. Currently in New Hampshire, there is unclear and complicated guidance for individuals  
16 who wish to benefit from assisted reproductive technologies and gestational surrogacy, and the  
17 present statute creates unnecessary encumbrances for those who wish to use advancements in  
18 assisted reproductive technologies for the creation of their families, so that such technologies are not  
19 utilized. In order to codify current best legal practices regarding gestational surrogacy  
20 arrangements, this act:

21           I. Ensures that there is appropriate and clear statutory language that establishes updated  
22 and consistent standards and procedural safeguards for the protection of all parties to gestational  
23 carrier arrangements and agreements, and facilitates the use of assisted reproductive technologies in  
24 our society and in accordance with the public policy of this state;

25           II. Defines, confirms, and protects the legal status and best interests of children born as a  
26 result of gestational carrier arrangements and agreements prior to birth;

27           III. Protects the legal rights of intended parents in gestational carrier arrangements and

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1 agreements;

2 IV. Ensures that all parties in gestational carrier arrangements are legally protected and  
3 entering into gestational carrier agreements with the same rights, expectations, and responsibilities;  
4 and

5 V. Standardizes the minimum components of gestational carrier agreements, and recognizes  
6 that written gestational carrier agreements are valid and enforceable legal contracts.

7 248:2 Surrogacy. RSA 168-B is repealed and reenacted to read as follows:

8 style="text-align:center">CHAPTER 168-B  
9 style="text-align:center">SURROGACY

10 168-B:1 Definitions. In this chapter:

11 I. "Artificial insemination" means the introduction of semen into a women's vagina, cervical  
12 canal, or uterus through extracorporeal or noncoital means.

13 II. "Assisted reproduction" means a method of causing pregnancy other than sexual  
14 intercourse. The term includes, but is not limited to:

15 (a) Artificial insemination.

16 (b) Donation of eggs.

17 (c) Donation of embryos.

18 (d) In-vitro fertilization and transfer of embryos.

19 (e) Intracytoplasmic sperm injection.

20 III. "Compensation" means payment of any reasonable, valuable consideration to the  
21 gestational carrier.

22 IV. "Court" means that superior court in the county where the gestational carrier resides,  
23 where the intended parent or parents reside, or where the resulting child is born or is expected to be  
24 born, unless otherwise indicated in this chapter or by the gestational carrier agreement.

25 V. "Donor" means an individual who contributes a gamete or gametes or an embryo or  
26 embryos for the purpose of assisted reproduction with no claim or claims to present or future  
27 parental rights and obligations to any resulting child.

28 VI. "Embryo" means the fertilized egg.

29 VII. "Embryo transfer" means all medical and laboratory procedures that are necessary to  
30 effectuate the transfer of an embryo into the uterine cavity.

31 VIII. "Gamete" means either the ovum (egg) or the spermatozoa (sperm).

32 IX. "Gestational carrier" means a woman who is neither an intended parent nor a donor,  
33 who agrees to become pregnant with a child, to whom she is not genetically related, by assisted  
34 reproduction and pursuant to a gestational carrier arrangement.

35 X. "Gestational carrier agreement" means a written contract between the gestational  
36 carrier, her spouse or partner, if any, and the intended parent or parents, that sets forth the

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1 obligations, rights, and duties of the parties to a gestational carrier arrangement.

2 XI. “Gestational carrier arrangement” means the process by which a gestational carrier  
3 attempts to become pregnant with a child through assisted reproduction using the gamete or  
4 gametes provided by the intended parent or parents and/or donor or donors, which may or may not  
5 be genetically related to the intended parent or parents, and to which the gestational carrier has  
6 made no genetic contribution, and carry and give birth to such a child with the intention that the  
7 child will be solely the legal child of the intended parent or parents.

8 XII. “Health care provider” means a person who is duly licensed, certified, authorized, or  
9 registered under the laws of the state to provide health care, and includes all medical, psychological,  
10 counseling, and social work professionals.

11 XIII. “Intended parent” means a person who intends to become a parent of any child that  
12 results from a gestational carrier agreement. This term shall include intended mothers, intended  
13 fathers, or a combination of both. In the case of a married couple, any reference to an intended  
14 parent shall include both spouses for all purposes of this chapter.

15 XIV. “In vitro fertilization” means all medical and laboratory procedures that are necessary  
16 to effectuate the extracorporeal combining of egg and sperm and the resulting fertilization of the egg.

17 XV. “Mental health consultation” means an in-person meeting with a licensed mental health  
18 professional for the purposes of educating the participants about the effects and potential  
19 consequences of their participation in a gestational carrier arrangement, and of evaluating any  
20 potential psychological issues and risks posed by a party to a gestational carrier arrangement,  
21 including, but not limited to, the intended parent or parents or the gestational carrier’s mental  
22 health, external and environmental factors, ability to manage relationships, potential attachment  
23 issues, and ability to carry out his or her obligations, rights, and duties under a gestational carrier  
24 arrangement.

25 XVI. “Mental health professional” means an individual who:

26 (a) Holds a masters or doctoral degree in the field of psychiatry, psychology, counseling,  
27 social work, psychiatric nursing, or marriage and family therapy; and

28 (b) Is duly licensed, certified, authorized, or registered under the laws of a state to  
29 practice in the mental health field.

30 168-B:2 Parent-Child Relationship.

31 I. A person is the parent of a child to whom she has given birth, except as otherwise  
32 provided in this chapter and if the pregnancy was established pursuant to a gestational carrier  
33 arrangement.

34 II. A person is the parent of a child conceived via assisted reproduction if the person, except  
35 when acting in the capacity of a donor, consents to the performance of assisted reproduction or  
36 provides a gamete or gametes or an embryo or embryos for use in the assisted reproduction.

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1           III. A donor is not a parent of a child conceived through assisted reproduction.

2           IV. If a child is conceived via assisted reproduction after the death of the person referenced  
3 in paragraph II, consent to assisted reproduction shall be deemed valid only if the person had  
4 consented in writing prior to death that if assisted reproduction were to occur after death, the  
5 deceased individual would be a parent of the child.

6           V. Notwithstanding any other provision of law, a person is presumed to be the parent of a  
7 child if:

8               (a) The child is born to a person's spouse during the marriage, or within 300 days after  
9 the marriage is terminated for any reason, or after a decree of separation is entered by the court.

10              (b) Before the child's birth, the person and the child's other parent have attempted to  
11 marry each other by a marriage solemnized in apparent compliance with the law, although the  
12 attempted marriage is or could be declared void, voidable, or otherwise invalid; and

13                   (1) If the attempted marriage could be declared invalid only by a court, the child is  
14 born during the attempted marriage, or within 300 days after its termination for any reason; or

15                   (2) If the attempted marriage is invalid without a court order, the child is born  
16 within 300 days after the termination of cohabitation.

17              (c) After the child's birth, the person and the child's other parent have married, or  
18 attempted to marry each other by a marriage solemnized in apparent compliance with the law,  
19 although the attempted marriage is or could be declared void, voidable, or otherwise invalid; and

20                   (1) The person has acknowledged parentage of the child in a writing filed with the  
21 appropriate court or state agency;

22                   (2) With the person's consent, the person is named as the child's parent on the birth  
23 certificate; or

24                   (3) The person is obligated to support the child under a written voluntary promise or  
25 by court order.

26              (d) While the child is under the age of majority, the person receives the child into the  
27 person's home and openly holds out the child as that person's child.

28           VI. A presumption under paragraph V may be rebutted in an appropriate action only by  
29 clear and convincing evidence. The existence of the parent-child relationship presumed under  
30 paragraph V shall not, however, be rebutted by evidence that the child was conceived by means of  
31 assisted reproduction, so long as the presumptive parent complies with the requirements of  
32 paragraph II. In the absence of such compliance, a presumptive parent's consent shall be  
33 conclusively presumed by such parent's failure to object to the parent-child relationship by filing an  
34 action to dispute parentage within 30 days after the child's birth. If 2 or more presumptions of  
35 parentage arise that conflict with each other, the presumption that on the facts is founded on the  
36 weightier considerations of policy and logic controls. The presumption shall be rebutted by a court

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1 decree establishing parentage of the child with another person.

2 168-B:3 Legitimacy. If, under the provisions of this chapter, a parent-child relationship is  
3 created between 2 persons, the child shall be considered, for all purposes of law, the legitimate child  
4 of the parent.

5 168-B:4 Effect of Noncompliance. Noncompliance with the requirements of this chapter shall  
6 not affect the determination of parenthood under this chapter.

7 168-B:5 Parental Status of a Gestational Carrier and Her Spouse or Partner, If Any. Neither a  
8 gestational carrier nor her spouse or partner, if any, shall be a parent of a child conceived as a result  
9 of assisted reproduction and a gestational carrier arrangement.

10 168-B:6 Parental Status of a Donor. A donor shall not be a parent of a child conceived as a  
11 result of assisted reproduction and a gestational carrier arrangement.

12 168-B:7 Parental Status of the Intended Parent. A child conceived as a result of assisted  
13 reproduction and a gestational carrier arrangement shall be the child solely of the intended parent  
14 or parents. The parental rights of physical custody shall vest with the intended parent or parents  
15 immediately upon the birth of the child.

16 168-B:8 Rights and Responsibilities of Intended Parent. An intended parent of any child  
17 resulting from assisted reproduction and a gestational carrier arrangement shall meet each of the  
18 following requirements prior to any medical procedures to impregnate the gestational carrier:

19 I. He, she, or they have completed a mental health consultation.

20 II. He, she, or they have undergone legal consultation with independent legal counsel  
21 regarding the terms of the gestational carrier agreement and have been advised of the potential legal  
22 consequences of the gestational carrier agreement.

23 168-B:9 Eligibility of a Gestational Carrier. Prior to any medical procedures to impregnate the  
24 gestational carrier, a woman, intending to be a gestational carrier, shall meet all of the following  
25 requirements:

26 I. She is at least 21 years of age.

27 II. She has given birth to at least one child.

28 III. She has completed a physical medical evaluation, in substantial conformance with the  
29 guidelines set forth by the American Society for Reproductive Medicine, relating to the anticipated  
30 pregnancy.

31 IV. She has completed a mental health consultation

32 V. She, and her spouse or partner, if any, have undergone legal consultation with  
33 independent legal counsel regarding the terms of the gestational carrier agreement and have been  
34 advised of the potential legal consequences of the gestational carrier agreement.

35 168-B:10 Enforceability of Gestational Carrier Agreement. To best protect all parties entering  
36 into a gestational carrier arrangement, a gestational carrier agreement shall meet the minimum

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1 requirements under RSA 168-B:11. A gestational carrier agreement that conforms to these  
2 requirements is a legal contract that is presumed to be valid and enforceable and is legally  
3 enforceable by the court. The parties to a gestational carrier agreement may petition the court for  
4 an order affirming the status of a gestational carrier agreement. The court shall issue such an order  
5 upon a finding that the agreement meets the minimum requirements under RSA 168-B:11.

6 168-B:11 Requirements for a Gestational Carrier Agreement. A gestational carrier agreement  
7 shall meet all of the following minimum requirements:

8 I. It shall be in writing.

9 II. It shall be executed prior to the commencement of any medical procedures to impregnate  
10 the gestational carrier.

11 III. All parties shall be represented by legal counsel regarding the gestational carrier  
12 agreement and the gestational carrier and her spouse or partner, if any, shall have legal counsel that  
13 is separate and independent from the legal counsel for the intended parents.

14 IV. It shall expressly provide for the following:

15 (a) The express written agreement of the gestational carrier to:

16 (1) Undergo embryo transfer, become pregnant by means of assisted reproduction,  
17 and attempt to carry and give birth to the resulting child;

18 (2) Relinquish all rights, obligations, and duties as a parent of the resulting child;  
19 and

20 (3) Surrender physical custody of the resulting child to the intended parent or  
21 parents immediately upon birth of the child.

22 (b) The express written agreement of the gestational carrier's spouse or partner, if any,  
23 if such spouse or partner is a party to the agreement, to abide by the obligations imposed on the  
24 spouse or partner pursuant to the terms of the gestational carrier agreement, including, but not  
25 limited to, the relinquishment of all rights, obligations, and duties as a parent of the resulting child.

26 (c) The express written agreement of the intended parent or parents to:

27 (1) Accept sole rights, obligations, and duties as parent or parents of the resulting  
28 child;

29 (2) Accept sole physical custody of the resulting child immediately upon birth,  
30 regardless of number, gender, and/or physical or mental condition; and

31 (3) Assume sole responsibility for the support of the resulting child immediately  
32 upon birth.

33 (d) The express written agreement of all parties as to how reasonable compensation, if  
34 any, shall be paid to the gestational carrier, including, but not limited to, payment of the gestational  
35 carrier's reasonable medical, counseling, legal, and/or other expenses related to the gestational  
36 carrier arrangement.

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1           (e) The express written agreement of all parties as to how, if the gestational carrier  
2 breaches a provision of this chapter or of the gestational carrier agreement, and such a breach causes  
3 harm to the resulting child, the gestational carrier will cover her potential liability for such harm,  
4 pursuant to RSA 168-B:18.

5           (f) The express written agreement of all parties as to how decisions regarding  
6 termination of the pregnancy shall be made.

7           168-B:12 Parentage Orders.

8           I. Any of the parties to a gestational carrier agreement may petition the circuit court for a  
9 parentage order declaring that the intended parent or parents are the sole parents of a child  
10 resulting from assisted reproduction and a gestational carrier arrangement, and that the gestational  
11 carrier and her spouse or partner, if any, are not the parent or parents of such a child. Such a  
12 petition may be brought in the circuit court in the county where the gestational carrier resides,  
13 where the intended parent or parents reside, or where the resulting child is born or is expected to be  
14 born. Such a petition may be brought either before, during, or subsequent to the pregnancy. The  
15 court shall, within 30 days, grant the petition upon a finding that the parties have substantially  
16 complied with the requirements of this chapter pertaining to the execution of a gestational carrier  
17 agreement. Sworn affidavits demonstrating substantial compliance shall be sufficient to permit such  
18 a finding and a hearing shall not be required unless the court requires additional information which  
19 cannot reasonably be ascertained without a hearing. In the absence of such substantial compliance,  
20 the court may in its discretion issue such parentage order upon a finding that the parties intended to  
21 enter into a gestational carrier arrangement and the best interests of the child would be met by  
22 permitting parentage to be established in this manner. Such parentage orders issued under this  
23 section shall conclusively establish or affirm, where applicable, the parent-child relationship.

24           II. Upon the request of any party, such parentage order shall direct that the certificate of  
25 birth name the intended parent or parents as the sole parent or parents of the resulting child and  
26 that such a certificate of birth shall not name the gestational carrier or her spouse or partner, if any,  
27 as the parent or parents of the resulting child.

28           III. All proceedings pursuant to this section shall be closed to the public, and papers and  
29 records pertaining to such proceedings shall be subject to inspection only upon consent of all the  
30 parties or upon a showing of good cause supported by a court order.

31           168-B:13 Marriage or Partnership of a Gestational Carrier During the Gestational Carrier  
32 Arrangement. The marriage or partnership of a gestational carrier after she executes a gestational  
33 carrier agreement does not affect the validity or the terms of the gestational carrier agreement, and  
34 her spouse or partner shall not be a parent of the resulting child.

35           168-B:14 Intestate and Testate Succession. Subject to the provisions of RSA 168-B:15, a child  
36 shall be considered a child only of his or her parent or parents and the parent or parents shall be

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1 considered the parent or parents of the child, as determined for the purposes of:

2 I. Intestate succession.

3 II. Taking against the will of any person.

4 III. Taking under the will of any person, unless such will provides otherwise.

5 IV. Being entitled to any support or similar allowance during the administration of a  
6 parent's estate.

7 168-B:15 Death of the Intended Parent or Parents.

8 I. Prior to any embryo transfer pursuant to the gestational carrier arrangement, the  
9 intended parent or parents shall make guardianship provisions for the prospective child by  
10 amending their existing estate planning documents, or by executing estate planning documents  
11 containing such provisions if they have no existing estate planning documents.

12 II. In the event that the intended parent or parents predecease the birth of the resulting  
13 child, the terms and conditions of the gestational carrier agreement shall remain in full force and  
14 effect, and the resulting child shall be delivered into the sole care and custody of the guardian  
15 nominated in the estate planning documents of the intended parent or parents, or of the guardian  
16 designated by a court of appropriate jurisdiction, if both parents are deceased, or into the sole care  
17 and custody of the surviving intended parent if only one of the 2 intended parents is deceased.

18 III. Any child conceived by assisted reproduction and pursuant to the terms of the  
19 gestational carrier agreement shall have all testamentary and inheritance rights from the intended  
20 parent or parents, and shall have no testamentary or inheritance rights from the gestational carrier  
21 and her spouse or partner, if any. The intended parent or parents shall have testamentary and  
22 inheritance rights from the resulting child as parents.

23 168-B:16 Noncompliance. Noncompliance by the gestational carrier, the gestational carrier's  
24 spouse or partner, if any, or by the intended parent or parents occurs when that party breaches a  
25 provision of this chapter and/or a provision of the gestational carrier agreement.

26 168-B:17 Effect of Noncompliance. Except as otherwise provided in this chapter, in the event of  
27 a party's noncompliance with the requirements of this chapter and/or with a provision of the  
28 gestational carrier agreement, the court shall determine the respective rights and obligations of the  
29 parties, unless the gestational carrier agreement provides otherwise.

30 168-B:18 Remedies.

31 I. Except as expressly provided in the gestational carrier agreement, the intended parent or  
32 parents shall be entitled to all remedies available at law or equity.

33 II. Except as expressly provided in the gestational carrier agreement, the gestational carrier  
34 shall be entitled to all remedies available at law or equity.

35 III. A breach of a provision of this chapter and/or of the gestational carrier agreement by the  
36 intended parent or parents, after the gestational carrier is impregnated, shall not relieve such

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1 intended parent or parents of the intended parent's or parents' obligations imposed by this chapter.

2 IV. In the event of a breach of a provision of this chapter and/or of the gestational carrier  
3 agreement by the intended parent or parents, after the gestational carrier is impregnated, the  
4 gestational carrier shall be entitled to receive all compensation and other moneys due to the  
5 gestational carrier under the gestational carrier agreement.

6 V. A breach of a provision of this chapter and/or of the gestational carrier agreement by the  
7 gestational carrier, after the gestational carrier is impregnated, shall not relieve the gestational  
8 carrier of her obligations imposed by this chapter.

9 VI. If the gestational carrier breaches a provision of this chapter and/or of the gestational  
10 carrier agreement, and such a breach causes harm to the resulting child, the gestational carrier may  
11 be liable for payment of the resulting child's medical expenses not otherwise covered by the intended  
12 parent's or parents' insurance.

13 168-B:19 Irrevocability. No action to invalidate a gestational carrier agreement meeting the  
14 requirements of this chapter or to challenge the rights of parentage established pursuant to this  
15 chapter for a gestational carrier arrangement shall commence once the pregnancy is established.

16 168-B:20 Rulemaking. The department of health and human services shall adopt rules,  
17 pursuant to RSA 541-A, to carry out its duties under this chapter. Until such time as the  
18 department of health and human services adopts rules pursuant to this section, medical evaluations,  
19 mental health consultations, and other procedures required under this chapter shall be conducted in  
20 accordance with the relevant sections of guidelines published by the American Society for  
21 Reproductive Medicine (ASRM), the Society for Assisted Reproductive Technologies (SART), and the  
22 American College of Obstetricians and Gynecologists (ACOG).

23 168-B:21 Severability. If any provision of this chapter or the application thereof to any person  
24 or circumstance is held invalid, the invalidity does not affect other provisions or applications of the  
25 chapter, which can be given effect without the invalid provisions or applications, and to this end the  
26 provisions of this chapter are severable.

27 248:3 Effective Date. This act shall take effect upon its passage.

28 Approved: July 21, 2014

29 Effective Date: July 21, 2014